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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76- 392

FIRST NATIONAL BANK IN ST. LOUIS
a National Banking Association,
Petitioner,

v.

STATE OF MISSOURI, ex rel. W. R. KOSTMAN,
Commissioner of Finance,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

First National Bank in St. Louis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter entered on July 20, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is appended as Appendix A. The opinion of the District Court, reported in 405 F.Supp. 733 (E.D. Mo. 1975), is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is an "on-line" and unmanned customer-bank-communication terminal through which limited banking transactions may be electronically initiated by a customer a "branch" bank within the meaning of the National Bank Act?

STATUTES INVOLVED

Federal Statutes: 12 U.S.C. § 36(c); 12 U.S.C. § 36(f).

Missouri Statutes: § 362.105 Mo.Rev.Stat. (1969); § 362.107 Mo.Rev.Stat. (1969).

The relevant federal and state statutes are quoted in full in Appendix C and D, respectively.

STATEMENT

Petitioner, First National Bank in St. Louis ("First National"), is a national banking association organized under the National Bank Act. First National's principal office is in the City of St. Louis, Missouri. Respondent, W. R. Kostman (the "Commissioner"), is the Commissioner of Finance of the State of Missouri. The Commissioner is the official of the State of Missouri who is charged with execution and enforcement of the laws of

the State of Missouri relating to banks and the business of banking.

On December 18, 1974, First National placed two customer-bank-communication terminals (hereinafter referred to as CBCTs) in operation. Both of the First National CBCTs are located in the County of St. Louis, Missouri several miles from First National's main banking house.

First National's CBCTs are stationary machines which can be used by First National customers to initiate a limited number of banking transactions as hereinafter described. None of First National's CBCTs are manned or staffed and customers using the CBCTs are not attended by an employee of First National. Each of First National's CBCTs consists of a console module, an electronic module and a depository module together with a transformer switch and telephone connection equipment and apparatus. First National's CBCTs are sometimes referred to by First National as "Bank 24 Machines" or a "Bank 24".

A Bank 24 Machine can be used only by a customer of First National holding a Bank 24 card which is a plastic card much like a credit card. A customer uses a Bank 24 Machine by inserting a Bank 24 card (which activates the machine) and sequentially pressing buttons (which are legended or numbered) in accordance with the transaction or transactions desired. A light flashes on the machine to instruct the customer at each step in the relevant transaction.

Only certain banking transactions can be initiated through a Bank 24 Machine. Transactions which a First National customer can initiate through a Bank 24 Machine are limited to (i) procuring cash in prepackaged amounts which will be debited to the customer's checking or savings account (depending on instructions given through the Bank 24 Machine by the customer), (ii) procuring cash in prepackaged amounts by charge against the customer's Master Charge account, (iii) trans-

ferring funds between the customer's checking and savings accounts, (iv) transferring funds to the customer's checking account by charge against the customer's Master Charge account, (v) payment on the customer's obligations to First National by deposit of the amount of such payment in the Bank 24 Machine, (vi) payment on the customer's obligations to First National by debit to the customer's checking or savings account, and (vii) deposit of funds to the customer's checking or savings account.

First National's CBCTs operate "on-line" in computer terminology. This means that each of First National's CBCTs are in constant electronic communication with a computer system located on the main banking premises of First National. By way of distinction, a machine which is operating "off-line" is self-contained, not electronically in communication with any bank or computer system and all records made by such a machine must be withdrawn from the machine to initiate accounting and processing.

Daily, employees of First National visit the Bank 24 Machines and collect documentation, checks, cash or payments which have been placed therein by customers, replenish the cash in the CBCT, if necessary, and deliver the records, documentation, checks, cash or payments to the Bank. Those items, including copies of receipts which the CBCT has issued to customers, are manually balanced. At or about the same time, the magnetic tape record which has been made by the computer system at First National simultaneously with operations at the CBCT is run and balanced for proof purposes with the manual account.

On January 6, 1975, the Commissioner filed these proceedings in the Circuit Court of the City of St. Louis, Missouri, alleging that operation by First National of its CBCT ". . . constitutes the establishment and operation of a branch bank, branch office, branch agency, additional office, and a place

of business contrary to 12 U.S.C. § 36 for the reason that the conduct of banking business at such location is contrary to the laws of the State of Missouri restricting branch banking and in particular Sections 362.105 R.S.Mo. (1969) and 362.107 R.S.Mo. Supp. (1973)." The Commissioner asked for a declaratory judgment that First National was illegally conducting a banking business through its CBCTs and for an order temporarily and permanently enjoining First National from operating its CBCTs. First National removed the case to the District Court for the Eastern District of Missouri. On November 14, 1975, the District Court [which had jurisdiction of the matter pursuant to 28 U.S.C. §§ 1331(a), 1337 and 1441] entered judgment in favor of the Commissioner. First National appealed the decision of the District Court and the Court of Appeals affirmed on July 20, 1976. On First National's motion, the Court of Appeals has stayed its mandate pending final disposition of this matter by the United States Supreme Court.

The Question Presented in this matter is substantially the same as that involved in the following petitions for writs of certiorari presently pending before this Court:

State of Illinois ex rel. Lignoul v. Continental Illinois National Bank & Trust Co., 409 F.Supp. 1167 (N.D. Ill. 1975), aff'd in part and rev'd in part, 536 F.2d 176 (7th Cir. 1976), petition for certiorari was filed, No. 75-1900

State of Illinois ex rel. Lignoul v. The First National Bank of Chicago, 409 F.Supp. 1167 (N.D. Ill. 1975), aff'd in part and rev'd in part, 536 F.2d 176 (7th Cir. 1976), petition for certiorari was filed, No. 76-17

(Nos. 75-1900 and 76-17 are sometimes hereinafter referred to as the "*Illinois*" cases.)

Independent Bankers Association of America v. Smith, 402 F.Supp. 207 (D.D.C. 1975), aff'd. 534 F.2d 921

(D.C. Cir. 1976), petition for cert. filed No. 76-258 (sometimes hereinafter referred to as the *"District of Columbia"* case)

In addition, First National is advised that a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit will be applied for in *Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, Nos. 75-1523, 75-1611 and 75-1612 (10th Cir.Ct.App. August 20, 1976), affirming in part and reversing in part 349 F.Supp. 979 (D. Colo. 1975) (sometimes hereinafter referred to as the *"Colorado"* case). If filed, the petition in that matter would also present issues involving the same question as that presented herein.

REASONS FOR GRANTING THE WRIT

This matter involves an important question of federal law arising under the National Bank Act. Specifically, the issue is whether a CBCT is a "branch bank" within the definition of §36(f) [12 U.S.C. §36(f)] of the Act. Resolution of that issue will require analysis of the legislative history of the Act and further clarification of the doctrine of the so-called "competitive equality".* Because of the significance of the entire subject of electronic fund transfers to the banking industry, the manner in which this and other related cases are disposed of will have substantial impact on the ability of the national banking system to utilize technological innovations, to maintain the highest standards of competition and to deliver the advantages of such innovations and competition to the consumers of banking services.

The Court of Appeals held that First National's Bank 24 Machines were branch banks within the meaning of §36(f) of the Act, which provides in relevant part that:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

Missouri law prohibits banks from maintaining branches [with exceptions not here relevant, see Appendix §§362.105 and 362.-107 Mo. Rev. Stat. (1969)]. Section 36(c) of the National Bank Act [12 U.S.C. §36(c)] permits establishment of branches by national banks only to the extent the statutes of the state in

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* See *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) hereinafter referred to as *"Dickinson"* and *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966) hereinafter cited as *"Walker Bank"*.

question specifically allow state banks to branch. The Court of Appeals below thus held that First National would have to stop operation of its CBCTs.

CBCTs are not branches under §36(f) whether operated by First National in Missouri or by any other national bank in any other state. In finding otherwise in the case of First National, the Court of Appeals—

> (a) Erroneously construed and applied the doctrine of so-called "competitive equality" by misconstruing what this Court said in the *Dickinson* and *Walker Bank* cases. That error, if not corrected by this Court in this and the cases wherein similar petitions for certiorari are pending, will result in frustration of the legislative intent of the National Bank Act and will seriously impair the ability of national banks to compete with other financial institutions.
>
> (b) Mistakenly applied the National Bank Act definition of "branch" to CBCTs by failing fully to analyze that definition in the light of its legislative history and the actualities of what a CBCT is and does. That mistake, if not corrected by this Court in this and the cases related to it, will result in national banks being precluded from utilizing the technological advances represented by CBCTs and banking customers will be denied the benefits made possible by improved technology.

The Court of Appeals in this matter relied almost wholly on the *Illinois* and *District of Columbia* cases. Those matters, as indicated in the Statement above, are presently before this Court on petitions for certiorari. The Reasons for Granting the Writ expressed in those petitions and in the *Amicus Curiae* brief of the American Bankers Associations filed in connection with the petition in the *District of Columbia* case are equally applicable to this case. By way of further emphasizing the importance of the question which, although variously stated, is common to these matters, we would urge the Court to consider the following.

A. **Erroneous Construction and Application of the Doctrine of Competitive Equality**.

The Court of Appeals held that §36(c) of the National Bank Act limits the branching powers of national banks in order to provide for "competitive equality" among state and national banks (Appendix A, p. A-2). The Court of Appeals relied upon the *Dickinson* and *Walker Bank* cases as establishing this principle and causing it to be applicable in the context of CBCTs. The inescapable implication of what the Court of Appeals held is that the National Bank Act was intended to and has been construed by this Court to require "sameness" as to what is permitted state banks and national banks in their branching activities. This is equivalent to saying, as regards a particular activity which is alleged to be branching, that if a state bank can't do it then neither can a national bank. This is not what was intended by Congress when it enacted §36 of the Act nor has this Court given such a construction to §36. However, it is necessary and appropriate that this Court should rule definitively now.

The *Walker Bank* case involved an attempt by a national bank to establish *de novo* branches at locations where state banks, under state law, would be permitted to do so only by *acquiring existing* banks. There was no question but that what the national bank was doing was branching—the issue was whether the national bank could go about branching in a manner prohibited to a state bank. This Court held that the national bank could not and that state branching law had to be observed in *all* details when a national bank set about branching. Section 36(c) of the Act was at issue in the *Walker Bank* case [not §36(f)] and the issue of what constituted a branch bank was not before this Court.

The review of the legislative history of §36(c) in the *Walker Bank* case suggests that Congress sought "competitive equality" in the matter of state and national bank branching and that, at least in the matter of branching, the National Bank Act created (as between national and state banks) an equivalence which was not elsewhere imposed by the Act. Regardless of whether this is true, it is undeniable that this holding was in the context of *"how, when and where"* a national bank may establish what is undisputably a branch. It does not necessarily follow from the *Walker Bank* case that what *is* a branch is also to be determined with reference to the same principles.

The *Dickinson* case did involve the question as to what *is* a branch. The factual situation was very different. There, a national bank was operating an armored car manned by a teller who received deposits and cashed checks at customers' places of business and in a shopping center. Also, the bank maintained a receptacle in a shopping center in which bank customers placed their deposits, later collected by the teller in the armored car. The issue in the *Dickinson* case was not *"how, when and where"* § 36(c) permitted the bank to branch but whether what the bank was doing was operating a branch as "branch" is defined in § 36(f). The *"how, when, where"* issue before the Court in the *Walker Bank* case involved an interpretation of § 36(c) of the National Bank Act—the issue before the Court in the *Dickinson* case involved an interpretation of § 36(f) of the Act. Section 36(c) of the National Bank Act indeed and in fact controls "how, when and where" a national bank may branch, expressly incorporates the law of the state in question and requires "sameness" as regards what state and national banks can do in the matter of branching but not in what constitutes a branch. Thus, to say that § 36(c) mandates "competitive equality" is but to state the obvious.

Section 36(f) at issue in the *Dickinson* case, merely defines what constitutes a branch of a national bank. Congress could

have but did not incorporate or require reference to state law in this definitional section as it did in § 36(c). It necessarily follows that the requirement of "competitive equality" should not be imported or read into § 36(f).

In the *Dickinson* case, this Court fully recognized that Congress did not intend to incorporate state law into the definitional § 36(f) as it had in the permissive § 36(c).* Nevertheless, the Court found the activities of the national bank to be branching within the meaning of § 36(f).

There can be no doubt that the bank in the *Dickinson* case had a manned, mobile place of business which visited the bank's customers at their doorsteps and a shopping center—there can also be no doubt that deposits were being received and checks were being cashed by the bank at or in connection with its manned, mobile place of business. What the bank was doing in *Dickinson* was within the definition of "branch" in § 36(f). What CBCTs do is not.

The courts of appeals which have decided cases involving CBCTs correctly read the *Dickinson* case as standing for the propositions that § 36(c) embodies the principle of competitive equality, but they mistakenly read it as supporting the proposition that national bank use of CBCTs is factually similar to the activity found to be branching in the *Dickinson* case. This error should be corrected by this Court.

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* "Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank, supra,* for in §36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result as appears from the inclusion in §36 of a general definition of 'branch'." 396 U.S. 122, 133-134.

B. **Mistaken Application of § 36(f) to CBCTs.**

To understand fully why CBCTs cannot be within § 36(f), what Congress envisaged when it enacted § 36(f) must be placed in historical perspective.

Prior to enactment of what is now § 36, the National Bank Act was silent as regards branching powers of national banks. In 1923 the Comptroller authorized national banks to provide limited banking services at "teller windows" set up in the city where the particular bank in question was located. In 1924, this Court held in *First National Bank in St. Louis v. State of Missouri*, 263 U.S. 640 (1924), that a national bank lacked statutory authority to branch. As this cast doubt on the validity of the Comptroller's 1923 ruling, it was clear that the National Bank Act would have to be amended to permit national banks to compete on an equal basis with state banks in terms of branching.

The Congressional response to this situation was what is now § 36 (sometimes referred to as the "McFadden Act"). Congressional debates centered around the desirability of branch banking *versus* unit banking and early versions of the McFadden Act did not contain any serious attempt at definition of the term "branch" or any direction as to whether state or federal law should control the definition, see *Electronic Funds Transfer and Branch Banking—The Application of Old Law to New Technology*, 35 Mo. L. Rev. 88, 98 (1975).

It became apparent in Congressional debates that at least some national banks which had acted under the Comptroller's 1923 authorization had gone beyond the limited provision of banking services he had contemplated and were doing more or less of a full-fledged banking business at their "teller windows" which were in reality branch banks. Congressional concern was obviously to make clear that these were branches and were legally protected under § 36(c) only if they conformed to requirements of the Act relating to branches of national banks. It may reasonably be inferred from this that the definition of branch as written in § 36(f) was really aimed at the Comptroller's 1923 authorization and what national banks had been doing pursuant thereto. As finally settled upon, § 36(f), at least as explained by Representative McFadden, defined a branch as,

> "Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money or transacting any business carried on at its main office, is a branch if it is legally established under the provisions of this act." 68 Cong. Rec. 5816 (1927), partially quoted in the *Dickinson* case, 396 U.S. 122, 134 (1969).

The last phrase of the above quote shows clearly that the § 36(f) definition was meant to clarify the status of off-premise facilities which had been established under the Comptroller's 1923 authorization.

This explanation emphasizes two points. First, Congress had a particular situation in mind when it was considering the McFadden Act. That situation was that national banks did not have but should be given statutory power to branch. Only incidental to this was consideration of what a branch was. Second, and as to what Congress thought a branch was, Congress in framing its definition in § 36(f), was aiming at or had in mind the brick and mortar, manned facilities which national banks had been establishing pursuant to the Comptroller's 1923 authorization to offer off-premises banking services. Congress certainly did not have in mind and could not have had in mind, anything like the then unknown and unenvisioned CBCTs.

What Congress was visualizing in its definition of a branch must be even more clear from the fact that § 36 provides certain minimum capital requirements for the establishment of na-

tional bank branches. A capital requirement is certainly consonant with an establishment which is a "place of business", a structure which is meant to house offices, personnel and the like; but a capital requirement is wholly at odds with an unmanned communications device like a CBCT.

Although it is generally agreed that *Dickinson* stands for the proposition that what constitutes a branch of a national bank is to be determined solely with reference to the federal definition of the term contained in § 36(f) of the National Bank Act, the tendency of the Courts has been to analyze the § 36(f) definition of branch in terms of what a state bank can or cannot do in the relevant state. The result of such analysis is to have the federal definition of branch colored (if not determined) by the law of each state. There is no indication that § 36(f) is to be interpreted or applied this way in the language of the statute [in contradistinction to what § 36(c) expressly provides]. Furthermore, to the extent this tendency results in disallowing deployment of CBCTs simply on the basis that such would be disallowed to a state bank, the state in question has effectively controlled this aspect of the activities of national banks in that state. This, the *Dickinson* case instructs, is wrong because it allows ". . . the States to define the content of the term 'branch' which would make them the sole judges of their own powers." 396 U.S. 122, 133-134.

In a case subsequent to the *Dickinson* case involving application of § 36(c), it was held that state administrative interpretations of state law should not be binding on the Comptroller in his approval of a national bank branch, *First National Bank of Fairbanks v. Camp*, 465 F.2d 586 (D.C. Cir. 1972), cert. den. 409 U.S. 1124 (1973). There, the Comptroller had approved "tellers' windows" which amounted to branch banks although it was clear that a state bank would not have been allowed to branch because of the way the state comptroller interpreted state law. The court pointed out that the idea of "competitive equality" requires that neither state nor federal officials should (in a matter of interpretation) be able to veto the other and that any inequality which this caused was merely the permissible result of there being a dual banking system.

This suggestion that "sameness" is not necessarily the final rubric is significant, particularly because it was made in the context of § 36(c).

If state law is made a reference point for applying § 36(f), it must be recognized that serious consequences could result for national banks. The decisions in CBCT cases have not fully come to grips with this matter.

If, after the "branch" definition of § 36(f) is applied to deny use of CBCTs to national banks, the law of the relevant state is held to permit or is changed (by judicial decision, statute or administrative action) to permit state banks to operate CBCTs, state banks could then use CBCTs but national banks could not. It cannot be supposed that, because of the provisions of state law or of a change in state law, what was a branch for the purpose of § 36(f) becomes not a branch. If what was formerly a branch under § 36(f) is not a branch due to a change in state law, then mere lip service has been given to the proposition that the federal law definition of what constitutes a branch is controlling as to national banks.

The problem is real as is exemplified by the apparent illogic into which the court of appeals bound itself in the *District of Columbia* case. There the court held that CBCTs are "branches" within the meaning of § 36(f). But, having expressly so held, the Court went further and qualified its decision by holding:

> "If a state permits its state-chartered banks to establish CBCTs for the purpose of (1) receiving deposits, or (2) paying checks, or (3) lending money, then national banks in that state can also establish CBCTs limited to the functions permitted under state law.

"This result would hold true even in a state that prohibits branch banking but permits the use of CBCTs since they are not considered 'branches' under state law." (534 F.2d 921, 948)

But the Court went on to say:

"Our holding, however, does not mean that national banks cannot establish and operate off-premises CBCTs in a state (e.g., Florida) that generally prohibits branch banking *when that state does not define CBCTs as 'branches' for purposes of state law.*" (Emphasis the Court's.) (534 F. 2d 921, 948)

If this is the law, then the result would be that we would have the anomalous situation of a CBCT, as defined by an Act of Congress, being a branch bank in some states, but not in others.

In a footnote, the Court undertook to further clarify its holding with a hypothetical example, saying:

"Suppose, for example, that the national bank in *Plant City* is now receiving deposits, paying checks, and lending money through the agency of several CBCTs, rather than an armored car and a shopping center receptacle.

"Florida prohibits all branch banking by state chartered banks, and we will assume that since *Plant City* there has been only the following change in Florida banking law: According to a recent state administrative opinion or ruling interpreting state law, CBCTs are not considered 'branches' *for purposes of state law*. Because under these assumed facts Florida statute law does not specifically and affirmatively grant to state banks the authority to establish and operate CBCTs without complying with the state's antibranch statute, a narrow interpretation of Section 36(c) could prevent the Comptroller from approving national

bank CBCTs in Florida. We reject this narrow interpretation of Section 36(c) for two reasons * * * We refuse to frustrate legislative intent by adopting this narrow reading of Section 36(c)'s language." (fn. 104, 534 F.2d 921, 948-949)

Thus, according to the District of Columbia Circuit, even if this Court should decide that CBCTs are "branches" within the meaning of §36(f), nevertheless, if the Commissioner of Finance of the State of Missouri should grant to state-chartered banks the power and authority to operate CBCTs, as he is authorized to do pursuant to §362.105(3) Mo. Rev. Stat. (1969), or if by legislation the General Assembly should permit state-chartered banks to use CBCTs, national banks could operate CBCTs in Missouri because, in spite of this Court's decision to the contrary, they would not be deemed to be "branches" in Missouri.

The time is certainly ripe for this Court to make clear that a proper construction of §36(f) calls for the term "branch" to have a uniform meaning as applied to national banks everywhere.

Finally, we submit with due deference that no court has fully analyzed CBCTs as branches with a view to the physical and functional characteristics of a "branch" contemplated by §36(f). The question here is as to the real content and meaning of §36(f) and the necessity of resolving the question is obvious. We have above mentioned the historical background of §36(f) and we have pointed out the specific physical and functional characteristics which Congress was dealing with in 1927. Section 36(f) by its terms clearly contemplates an actual bricks and mortar place of business where tellers are present to receive deposits, cash checks, make loans to customers and transact other banking business. A CBCT does not have the physical characteristics of a place of business and Congress certainly did not anticipate that a communication device like a CBCT would come into existence, much less be included within §36(f). We

respectfully submit that any conclusion that CBCTs are physically branches or that CBCTs receive deposits, pay checks or loan money in the sense of the statute is strained and bound ultimately to result in stultifying the effective delivery of better banking services to the general public.

A customer of First National could effect all of the banking transactions which can be effected through a Bank 24 Machine by use of the mail yet no one has contended that using the mail to effect banking transactions involves any kind of branch banking. The distinction is offered that a mailbox is not a "place" maintained by First National for the receiving of deposits, etc.,* but this rationalization is more formal than substantive and breaks down further when it is recognized that even if a CBCT is a "place" it is not a place where deposits are received, checks paid or money lent.

Deposits are not "received" by a bank until taken in, counted, verified and available to the bank for its use and to the customer for withdrawal. In the *Dickinson* case, a deposit became a liability of the bank and subject to withdrawal by the customer when the bank employees, a teller and the driver, manning the armored car, took same in or emptied the stationary receptacle and credited the same to the customer's account. Here, the CBCT is merely a temporary resting place of items which are credited to a customer's account on the books of First National at First National's main office as the customer operates the machine. The First National employee who empties the CBCT merely transports items to First National where final reconciliation takes place on the premises of the Bank. In this chain of events the Bank 24 Machine is merely a repository, not a depository.

CBCTs do not pay checks or make loans either. The cash dispensing function of a CBCT does not involve negotiation

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* See the *Illinois* case.

and payment of a written order on the customer's account (which is the essence of check payment). The essence of a loan is the agreement to advance funds upon the customer's agreement to repay same. Obviously CBCTs do not do this—all a CBCT does is disburse funds which First National has already agreed to lend and the customer has already agreed to repay. If this constitutes the making of a loan, then every loan which is closed and disbursed off of the premises of a national bank involves an impermissible branching activity.

It should not be authoritatively held that CBCTs receive deposits, pay checks or make loans. That result can only be reached by strained logic. Moreover, such a result completely ignores the fact that the CBCT is but the facilitator of a chain of events resulting in a credit or debit occurring on the books at the premises of First National. A CBCT is not the single focal point of deposit receipt, check payment or money lending which § 36(f) defines as a branch and holding a CBCT to be such arbitrarily disregards the very limited function mechanically performed by CBCTs and illogically elevates a communication device to the status of a branch bank or place of business.

CONCLUSION

This matter involves an important question of federal law, to wit, the proper construction and application of the National Bank Act in the context of change brought about through technological development unanticipated by the Act. The issues presented are necessarily bound to the doctrine of "competitive equality" which, as thus far developed by this Court, is uncertain of application and should be clarified. The immediate importance to the banking industry of the question here presented a evidenced by the volume of litigation generated in connection with deployment of CBCTs.

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 14, 1976.

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1056

State of Missouri, ex rel. W. R. Kostman, Commissioner of Finance,

Plaintiff-Appellee.

v.

First National Bank in St. Louis, a National Banking Association,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 14, 1976
Filed: July 20, 1976

Before Heaney and Henley, Circuit Judges, and Schatz, District Judge.*

PER CURIAM.

The First National Bank in St. Louis appeals from the decision of the District Court finding that the Bank's operation

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* Albert G. Schatz, District Judge, District of Nebraska, sitting by designation.

of customer-bank communication terminals (CBCTs) constituted the operation of branch banking within the meaning of 12 U.S.C. §36(f). The District Court found that this conclusion mandated the further finding that the Bank maintained more than two branch banks and was, therefore, in violation of 12 U.S.C. §36(c). The District Court enjoined the appellant from operating the CBCTs in question or the utilization of any similar machines. The court later, however, suspended the permanent injunction pending appeal. We affirm the findings of the District Court.

12 U.S.C. §36(f) provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. §36(c) provides that a national bank may establish, with the approval of the Comptroller of the Currency, branch banks within a state provided that state banks are also permitted by state statute to establish and maintain similar type and number of branch bank facilities. The case law clearly establishes that national banks are limited in this manner in order to provide for "competitive equality" in branch banking. *First National Bank v. Dickinson*, 396 U.S. 122, 133 (1969); *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Nebraskans for Ind. Banking v. Omaha Nat. Bank*, 530 F.2d 755, 760 (8th Cir.) (en banc), *vacated and remanded on other grounds*, 44 U.S.L.W. 3698 (U.S. June 10, 1976) (No. 75-1382); *Driscoll v. Northwestern National Bank of St. Paul*, 484 F.2d 173, 175 (8th Cir. 1973). Section 362.107 R.S. Mo. (1969), provides that state banks may operate only two facilities in addition to the main

banking office, upon approval of the State Financial Commissioner.

The stipulated facts show that the First National Bank in St. Louis is a national banking association having its principal place of business at Broadway and Locust Streets in the City of St. Louis, Missouri. The Bank also conducts business at two additional separate facilities in the City of St. Louis. On December 18, 1974, the Bank placed in operation two Douctel Total Teller machines (CBCTs) at locations separate and apart from the other offices of the Bank.

It is further stipulated that these machines have the capacity to receive deposits, to transfer funds between different kinds of accounts within the parent banking facility, to accept payments on obligations to the Bank by either deposit or transfer and to provide cash in prepackaged amounts of $25, $50, $75 and $100 to a customer of the bank properly operating these machines.

The definition of branch banking in 12 U.S.C. § 36(f) is in the disjunctive. The offering of any of the services listed therein, receiving deposits, paying checks or lending money, when performed at a location "apart from the chartered premises," provides a basis for concluding that branch banking is taking place. *Nebraskans for Ind. Banking v. Omaha Nat. Bank, supra* at 759.

Our review of this record discloses that the machines in question are capable of receiving deposits and crediting the amount deposited to the customer's account. The ability of the CBCT machine, when properly operated, to perform this banking transaction at a location "apart from the chartered facility" constitutes branch banking. *Independent Bankers Association of America v. James E. Smith, Comptroller of the Currency of the United States*, No. 75-1786, slip op. at 35-43

(D.C. Cir. March 23, 1976). *See also State of Illinois ex rel. Richard K. Lignoul, etc. v. Continental Illinois National Bank and Trust Company of Chicago,* Nos. 76-1083, 76-1084 (7th Cir. May 27, 1976).[1] As the First National Bank of St. Louis already performs banking functions at three separate locations, the installation and use of the CBCT machines at two other locations constitutes a violation of 12 U.S.C. § 36(c).

We affirm the decision of the District Court and order the permanent injunction reinstated.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[1] Because 12 U.S.C. §36(f) is in the disjunctive and we find that the CBCT machines can accept deposits, we do not need to consider whether these machines can also cash checks or lend money within the meaning of 12 U.S.C. §36(f).

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

State of Missouri, ex rel. W. R. Kostman, Commissioner of Finance,
Plaintiff,
vs.
First National Bank in St. Louis, a National Banking Association,
Defendant.
No. 75-113 C (1)

JUDGMENT

A memorandum dated this day is hereby incorporated into and made a part of this judgment.

It Is Hereby Ordered, Adjudged, and Decreed that the judgment is rendered for the plaintiff and against the defendant.

It Is Further Ordered that the defendant be and is hereby permanently enjoined from operating the machines in question or any similar machines, effective thirty (30) days from date.

Dated this 14th day of November, 1975.

/s/ JAMES H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

State of Missouri, ex rel. W. R. Kostman, Commissioner of Finance,
Plaintiff,
vs.
First National Bank in St. Louis, a National Banking Association,
Defendant.
No. 75-113 C (1)

Finding of Fact and Conclusions of Law

This case was tried to the Court on a stipulation of facts and briefs of the parties.

Findings of fact

1. First National Bank in St. Louis (Bank), is a National Banking Association, having its place of business in the City of St. Louis, Missouri. The Bank also conducts business at two facilities located within the City of St. Louis.

2. W. R. Kostman (Commissioner) is the Commissioner of Finance of the State of Missouri. As such, he is charged with execution and enforcement of the laws of the State of Missouri relating to banks and the banking business.

3. On December 18, 1974, the Bank placed two machines in operation which contain and include a console module, an electronic module, and a depository module, together with a transformer switch and a telephone connection equipment and apparatus. In each machine is a telephone hot line, which is directly connected to the Bank and is manned at the Bank from 8:00 a.m. to 11:00 p.m., Monday through Friday. One of the

machines is located inside premises owned by Emerson Electric Company and the general public does not have access to this machine. The other machine is open to the general public. Both machines are located in St. Louis County, Missouri, which is a different county than the City of St. Louis.

4. The machines may affect the following transactions for a customer of the Bank:

a. Procure cash in pre-packaged amounts of $25.00, $50.00, $75.00, and $100.00 by debiting the customer's checking account or savings account, and also by charging against the customer's Master Charge account at the Bank;

b. Deposit funds in the form of instruments or cash to the customer's savings account or checking account;

c. Transfer funds from customer's checking account to customer's savings account or vice versa;

d. Transfer funds to customer's checking account by use of his Master Charge account;

e. Make payment on obligations to the Bank by depositing payment in the form of cash or check or a debit from the customer's savings or checking account.

5. These machines are serviced daily by a Bank employee who removes any documentation, deposits, or payments, and carries them to the Bank. The machines are on line and are hooked directly into the computer at the Bank.

6. A Bank customer is issued a Bank 24 card, which contains all the numbers of his checking account, savings account, Master Charge account, and personal identification number. This card is used to operate the machines.

7. State charter banks in Missouri are not prohibited from banking by mail, telephone, or telegraph.

8. On December 12, 1974, the Comptroller of Currency of the United States, James E. Smith, issued a ruling which au-

thorized national banks to engage in the use of these machines and stated it would not constitute branch banking.

9. The Bank notified the Comptroller of its intention to place the two machines in operation.

10. This suit was filed originally in the Circuit Court of the City of St. Louis, Missouri, and was removed to this court under the provisions of 28 U.S.C. 1331(a), 1337, and 1441, because the matter in controversy involved an interpretation of the laws of the United States, 12 U.S.C. 36(f).

Conclusions of law

1. This Court has jurisdiction under the provisions of 28 U.S.C. 1331(a), 1337, and 1441, because the case involves the interpretation of federal statutes, 12 U.S.C. 36(f).

2. The state court had jurisdiction of this cause of action for the reason that the Commissioner of Finance is charged with enforcing the state banking laws and seeking a determination as to whether or not these machines constitute branch banking.

3. 12 U.S.C. 36(c) provides that a national bank may with the approval of the Comptroller of the Currency establish branches at any place in the state, provided state banks are permitted by statute to establish and maintain the same facilities.

4. The plaintiff, the Commissioner of Finance, has standing to enforce the banking laws of the State of Missouri and to prohibit national banks from violating the state laws. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

5. 12 U.S.C. 36(f) provides:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

6. Section 362.107, R.S.Mo. 1969, provides that a bank may operate two facilities on approval of the Finance Commissioner within the same city, town, village, or unincorporated community in which its banking house is located. By this section, national banks are accorded the same right as state banks, but a bank in Missouri may not operate a facility outside the county in which its principal banking house is located.

7. It was the intent of Congress that national banks should have the same right as state banks in the state in which they operate, but no more rights. *First National Bank v. Walker Bank*, 385 U.S. 252 (1966), and *First National Bank v. Dickinson*, 396 U.S. 122 (1969).

8. This Court is of the opinion that the machines in question constitute branch banks and violate 12 U.S.C. 36(f) and 362.107, R.S.Mo. 1969.

9. The plaintiff in this action is entitled to injunctive relief and defendant will be ordered to cease operation of the machines in question and any similar machines which it may install.

Dated this 14th day of November, 1975.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX C

United States Code

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated. If such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the

immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

* * * * * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

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APPENDIX D

Missouri Revised Statutes (1969) as Amended

362.105. **Powers and authority of banks and trust companies**

1. Every bank and trust company created under the laws of this state may:

(1) Conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral of personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, the corporation may receive and retain the interest in advance; provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;

* * * * * * *

3. In addition to the powers and authorities granted in this section, the commissioner of finance may, from time to time, with the approval of the state banking board, issue orders granting such other powers ad authorities as have been granted to financial institutions subject to the supervision of the federal government and which are necessary to enable banks and trust companies to compete. The orders shall be promulgated as provided in section 361.105, RSMo. and shall not be inconsistent with the constitution and the laws of this state.

362.107. **Banking facilities separate from banking house, limitations**

1. Any other law of this state to the contrary notwithstanding, every bank and every trust company organized under the laws of this state which has the corporate power to receive deposits may, upon compliance with this section, maintain and operate separate and apart from its banking house facilities for drive-in or walk-up service, where only checks may be paid, deposits received, deposits withdrawn, change made, exchange made, bank money orders issued, safe deposit boxes maintained and rented and loan payments received.

2. No such bank or trust company may maintain or operate:

(1) More than two such facilities separate and apart from its banking house at the same time excepting facilities required by the United States government to be maintained by it as financial agent of the government on government reservations solely for military and other government personnel, but nothing in this section shall be construed to authorize any bank or trust company organized under the laws of this state to establish or maintain such facilities as financial agent of the government on government reservations; or

(2) Such a facility outside the limits of the city, town or village or unincorporated community in which its banking house is located nor outside the county in which the bank or trust company's banking house is located, even if the limits of such city, town, village or unincorporated community extend across county lines, except as otherwise provided by law; or

(3) Such facility located closer than four hundred feet to the main banking house of another then existing banking institution unless such facility is located closer to the main banking house of the banking institution operating the facility than it is to the main banking house of any other then existing bank-

ing institution, or unless the banking institutions affected consent thereto in writing; or

(4) Such facility separate and apart from its banking house without having first obtained the approval of the commissioner of finance of the state of Missouri.

* * * * * * *

5. Nothing contained in this section shall be deemed to authorize the maintenance or operation of a branch bank or a branch trust company in contravention of the prohibition contained in section 362.105.

6. National banking associations located in this state have the same but no greater right under or by virtue of this section as banks and trust companies organized under the laws of this state.

Amended by Laws 1971, p. 84; § 2; Laws 1971, p. 349, § 1; Laws 1972, p. 973, § 1.